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No.

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

BARRY FLOYD BRAESEKE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California

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QUESTIONS PRESENTED

1. Whether a request to speak "off the record," made by a suspect who has been fully advised pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), reveals a lack of understanding of the *Miranda* warnings so as to invalidate a subsequent "on the record," *i.e.,* tape recorded, confession.

2. Assuming *arguendo* a technical violation of *Miranda,* whether physical evidence obtained as the result of good faith questioning should be admissible.

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Petition for a Writ of Certiorari to the Supreme Court of California

Petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this proceeding on August 28, 1980.

OPINIONS BELOW

The opinion of the Supreme Court of California filed on August 28, 1980, appears as Appendix A to this petition and is reported at 28 Cal.3d 86, ... P.2d ....., ... Cal.Rptr. ..... (1980). The majority and dissenting opinions of the Supreme Court of California filed on November 15, 1979, appear as Appendix B to this petition and are reported at 25 Cal.3d 691, 602 P.2d 384, 159 Cal.

Rptr. 684 (1979). The vacated opinion of the California Court of Appeal, First Appellate District, Division Two, appears as Appendix C to this petition and may be found at 154 Cal.Rptr. 619 (1979).

JURISDICTION

The judgment of the Supreme Court of California was entered on August 28, 1980, and became final 30 days thereafter (Rules 24(a) and 25(a), California Rules of Court). This petition for a writ of certiorari was filed within 60 days of August 28, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Statement of the Proceedings

On May 18, 1977, a California Superior Court jury for the County of Alameda found respondent (hereinafter referred to as defendant) Braeseke guilty as charged of the first degree murders (California Penal Code, § 187) of his mother, father and paternal grandfather, and further found that in murdering his parents he had personally used a firearm (CT 31-35).[1] On June 23, 1977, defendant was sentenced to state prison for the term prescribed by law (life) (CT 37-38A).

On April 17, 1979, the California Court of Appeal, First Appellate District, Division Two, affirmed the judgment in a 3-0 decision. (Appendix C.) The Court of Appeal opinion was vacated by the California Supreme Court's grant of hearing on July 5, 1979.

On November 15, 1979, the California Supreme Court reversed the judgment in a 4-3 decision. (Appendix B.)

The People filed a timely petition for rehearing on November 30, 1979. On December 13, 1979, the California Supreme Court extended the time for granting or denying a rehearing to and including January 11, 1980. On December 28, 1979, the petition was denied, with three justices voting for a rehearing, and the remittitur issued.

On December 31, 1979, the People petitioned to recall the issuance of the remittitur and for a stay of the execu-

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[1]In this petition, "CT" refers to the clerk's transcript on appeal; "ST" designates the transcript of a pretrial suppression hearing held on January 13 and 19, 1977; and "RT" refers to the reporter's transcript of the trial.

tion and enforcement of the judgment. The petition was denied on January 17, 1980.

On January 28, 1980, the People presented to Mr. Justice Rehnquist an application for a stay of the execution and enforcement of the judgment pending determination of a petition for certiorari (No. A-636). On January 31, 1980, Mr. Justice Rehnquist temporarily granted the stay and referred the matter to the full Court. On February 19, 1980, this Court granted the stay pending the timely filing and disposition of a petition for a writ of certiorari.

The People's petition for a writ of certiorari was docketed in this Court on March 19, 1980 (No. 79-1465). On May 12, 1980, this Court granted our petition for certiorari, vacated the judgment and remanded the case to the California Supreme Court for that court "to consider whether its judgment is based on federal or state constitutional grounds, or both."

On August 28, 1980, the California Supreme Court certified that its judgment "is based upon *Miranda v. Arizona* (1965) [*sic*] 384 U.S. 436 and the Fifth Amendment to the United States Constitution." (Appendix A.) The California Supreme Court deemed it unnecessary to alter its prior opinion reversing defendant's murder convictions, and reiterated that opinion (found at Appendix B) in its entirety. (Appendix A.)

On September 10, 1980, the People applied to the California Supreme Court for a stay of the issuance of the remittitur and for an order staying the execution and enforcement of the judgment. The application was denied

on September 17, 1980, and the remittitur issued on September 29, 1980.

On September 30, 1980, the People applied to Mr. Justice Rehnquist for a stay of the execution and enforcement of the judgment (No. A-286). On October 1, 1980, Mr. Justice Rehnquist granted the stay pending further order of the Court. On October 14, 1980, this Court continued the stay pending the filing and disposition of a petition for a writ of certiorari.

B. Statement of the Facts

The pertinent facts adduced at a pretrial suppression hearing which combined *Miranda* and search and seizure issues are as follows:

In the early morning hours of August 24, 1976, defendant Braeseke, aged 20, called the Alameda County Sheriff's Department and reported that after a night out with his friend David Barker, he had returned to his Dublin, California, home to find his mother, father and grandfather dead as the result of multiple gunshot wounds (ST 3-4; People's Trial Exhibit No. 28). Defendant, who was not a suspect, was transported to the sheriff's substation, where he talked to Detective Sergeants B. Cervi and G. Seher (ST 3-4, 13-14, 38). Between 4:20 a.m. and 5:15 a.m., defendant's exculpatory statement was openly tape recorded (ST 3-6, 15, 17-18, 38; People's Trial Exhibit No. 28).

Following this statement, the two detectives discussed the matter alone (ST 14-15). They detected some incon-

sistencies between defendant Braeseke's statement and what Barker had said in a separate interview (ST 18). It was also noted that defendant had some blood spots on the lower part of his pants (ST 18, 37). The detectives decided that defendant was not telling them the truth, and concluded that he was a suspect (ST 14-15, 17, 37-38, 42).

At approximately 6:00 a.m., defendant Braeseke was fully advised of his *Miranda* rights by Sergeant Seher, who read to him verbatim from the standard departmental form (ST 15-17, 35-39, 42). At the suppression hearing, defendant testified that he had in fact been advised of his constitutional rights (ST 55). Defendant told the detectives that he understood his rights and was willing to talk to them (ST 35-36, 39). This interview was not tape recorded so that defendant might speak more freely (ST 17, 22, 39).

During the interview, Sergeant Seher asked defendant how the blood got on his pants (ST 16, 18, 37). Defendant explained that it probably happened when he checked on the welfare of his parents (ST 37). However, the detectives concluded that the blood spots were consistent with "splattering," and that there would have been no "splattering" at that time (ST 37). Sergeant Seher specifically asked defendant if he had killed his parents, and defendant denied having done so (ST 16). Sergeant Seher then accused defendant of the killings and placed him under arrest (ST 14, 16-17, 39-40).

Thereafter, defendant Braeseke asked to see a lawyer (ST 16-17, 19, 40). The questioning ceased immediately,

and defendant was advised that the detectives could not ask him any more questions and that if he wanted to discuss the matter any further with them, he would have to initiate the conversation (ST 18, 36, 40, 42).

Sergeant Cervi then wheeled a typewriter over, put an arrest record form in it, and began to elicit booking information from defendant, such as his name, address, birthdate, and place of employment (ST 19, 23, 40-41). Sergeant Cervi did not complete filling out this form, because when he inquired about defendant's next of kin, defendant did not answer (ST 41). Defendant instead asked if he could talk to Sergeant Cervi alone (ST 19-20, 36, 41, 57). Sergeant Cervi agreed (ST 20-22, 41).

The two then went to another office, with Sergeant Cervi taking his tape recorder along (ST 20, 22-23, 41). At some point, defendant Braeseke asked to speak to Sergeant Cervi "off the record" (ST 20-21). The sergeant agreed (ST 21). The sergeant intended that an "off the record" conversation "would not count or would not be used against [defendant]" (ST 21).

Defendant Braeseke spoke in "hypotheticals," and finally asked what would happen if he had done what he had been accused of doing (ST 21-22, 26, 36).[2] Sergeant Cervi

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[2]Sergeant Cervi believed that the request to speak "off the record" had either preceded or followed the first "hypothetical" question, one to the effect of "What if I tell you the rifle was somewhere where some kids may find it?" (ST 20-21.)

Testimony regarding the "off the record" discussion was specifically elicited by defense counsel at the pretrial suppression hearing (ST 20-21).

replied that there was no way out of it, defendant was going to have to go to jail (ST 22). Defendant himself testified that at some stage Sergeant Cervi told him that it would be better for him if he gave a statement, but that he would have to go to jail anyway (ST 56-57).

Sergeant Cervi then asked if he could turn the tape recorder on and take a "formal statement" from defendant Braeseke (ST 9, 12, 22-23, 26, 42). Defendant agreed, and at 7:25 a.m., the sergeant turned on the tape recorder (ST 12, 22-23, 26, 35, 42; People's Trial Exhibit No. 32). Sergeant Cervi reminded defendant that they had previously talked, and that at one point defendant had asked to have a lawyer before he went any further. As the tape continued, defendant agreed that during the routine booking and filling out of the arrest form, he had asked if he could speak to Sergeant Cervi regarding the fatal shootings. In response to whether he was now speaking of his own free will, defendant replied, "Hell, yeah; yes." He stated, "Yes, yes," in response to whether he was well aware of the fact that he still had the right to have a lawyer present. He was again informed, and said that he understood, that if he could not afford to hire a lawyer, one would be appointed for him.[3] (People's Trial Exhibit No. 32.)

Thereafter, defendant Braeseke confessed that he and Barker had murdered defendant's parents and grandfather

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[3]Defendant was in fact so anxious to confess that he interrupted the sergeant's explanation about the right to an attorney to say that he understood it (ST 36-37; People's Trial Exhibit No. 32). This was but one of a number of factors leading the sergeant to the good faith belief that defendant understood his rights completely (ST 24, 36-37).

with defendant's .22 caliber rifle. According to defendant, Barker had suggested that the two kill defendant's parents and live off the insurance proceeds. They had discussed this idea for weeks and selected the night of August 23, 1976, as the time to commit the murders. (People's Trial Exhibit No. 32.)

On August 23, 1976, defendant and Barker spent the day planning their strategy. That night, defendant carried his rifle into the room where his parents, grandfather and Barker were watching television. Defendant stated that he first shot his father and then his mother. Defendant then told Barker to "get" his grandfather. When Barker hesitated, defendant picked up his grandfather and threw him down on top of his mother's body. Defendant ordered Barker to hit his grandfather, and Barker began striking defendant's grandfather on the head with a chisel Barker was carrying. According to defendant, he then gave Barker the rifle and Barker shot and killed defendant's grandfather. (People's Trial Exhibit No. 32.)

Defendant and Barker tried to make the house look as if it had been ransacked. They then fled in defendant's car, taking with them the .22 caliber rifle and certain items of personal property, including defendant's parents' wallets. Along the way, they abandoned the rifle under a bridge and made several stops. Defendant eventually drove Barker home, and Barker kept the remaining items taken from the murder scene.[4] Defendant then drove himself home and

[4]Evidence at trial disclosed that on August 24, 1976, these items were found at Barker's San Ramon, California, residence in a search conducted pursuant to a warrant, a warrant that was not attacked at the pretrial suppression hearing (RT 131-139).

reported discovering the bodies. (People's Trial Exhibit No. 32.)

Defendant's confession concluded at 7:55 a.m., with defendant stating that he would show the detective where the rifle was (People's Trial Exhibit No. 32). Thereafter, defendant directed two other detective sergeants to the rifle, and it was taken into custody (ST 26-28).

A few hours later, defendant Braeseke gave a taped statement to Deputy District Attorney Michael Cardoza (ST 31; People's Trial Exhibit No. 60). At the beginning of the interview, defendant was advised again of his *Miranda* rights. He said that he understood them and was willing to talk. He acknowledged that earlier that day he had been advised of those rights and had understood them. He further acknowledged that at some point during that earlier interview, he had told one of the detectives that he wanted to have an attorney present, and had been advised that if he wanted to talk further, he would have to initiate the contact with the detectives. Defendant recounted that during booking—a short time after he had been advised of his *Miranda* rights—he had told Sergeant Cervi that he wanted to talk to him, and that when he did so, he had the *Miranda* rights in mind, understood them, wanted to give them up, and that he thereafter gave a truthful statement. (People's Trial Exhibit No. 60.)

After these preliminary matters, defendant Braeseke expressed his present willingness to talk to the deputy district attorney about the crimes. Defendant was once again given his *Miranda* rights, waived them, and once more confessed. (People's Trial Exhibit No. 60.)

Following a court appearance on August 26, 1976, defendant Braeseke went to the booking office at the county jail (ST 48, 51). Deputy Sheriff P. Shelton, who was working in the booking office, noticed that defendant, whom he did not know, appeared emotionally shaken, as if he were about to cry (ST 48). In order to avoid having defendant break down right there, Deputy Shelton asked him what was wrong (ST 48). Defendant replied, "I didn't mean to do it. I didn't mean to kill them. It was an accident." (ST 49-50.)

Just prior to making this statement, defendant had handed the deputy a complaint form which he had evidently received in court (ST 50-51). After hearing defendant's remarks, the deputy looked at the form, and discovered defendant's name and the fact that he had been charged with three counts of murder (ST 50-51). Deputy Shelton then discontinued his conversation with defendant (ST 50).

Later on August 26, 1976, a search warrant was issued for the search of defendant's house in order to seize items corroborating what defendant had told Sergeant Cervi and Deputy District Attorney Cardoza (ST 29-33; People's Suppression Hearing Exhibit No. 1). Certain items were recovered from defendant's residence that same night, including the chisel that Barker was believed to have used to strike defendant's grandfather (ST 29-34; People's Suppression Hearing Exhibit No. 1).[5]

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[5]Evidence at trial disclosed that the chisel contained Barker's fingerprints etched in blood of the same type as defendant's grandfather's (RT 194-201).

Barker was convicted in a separate trial of the first degree murder of defendant's grandfather and the second degree murders of defendant's parents. These convictions were affirmed on appeal in *People v. Barker*, 94 Cal.App.3d 321, 156 Cal.Rptr. 407 (1979).

REASONS FOR GRANTING THE WRIT

This Court granted the People's prior application for certiorari in this case (No. 79-1465), vacated the California Supreme Court's judgment, and remanded the case for the California Supreme Court "to consider whether its judgment is based on federal or state constitutional grounds, or both." In response to this Court's directive, the California Supreme Court certified that its judgment is based upon this Court's *Miranda* decision and the Fifth Amendment to the United States Constitution. The California Supreme Court's certification enables the People to seek plenary review in this Court, and we do so by presenting the same questions that were presented in our previous petition for certiorari.

State courts have been admonished not to impose greater *Miranda* restrictions as a matter of federal constitutional law when this Court has specifically refrained from so doing. The California Supreme Court's opinion in this case goes impermissibly beyond this Court's *Miranda* requirements and, as Mr. Justice Rehnquist observed in granting our stay application on January 31, 1980, "comes extraordinarily close to the adoption of a rule that in *no* cases can waiver be inferred from the actions and words of the person interrogated." The California Supreme Court's extension of *Miranda* mandates review and an authoritative decision by this Court in order to prevent confusion about the requirements of federal law.

This case may also present the opportunity to answer a question left unanswered in *Michigan v. Tucker*, 417 U.S. 433 (1974), namely, whether, assuming *arguendo* a tech-

nical violation of the prophylactic rules of *Miranda*, physical evidence obtained as the result of good faith questioning should be admissible.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT HAS IMPERMISSIBLY EXTENDED THE REQUIREMENTS OF MIRANDA.

In the pretrial suppression hearing, the trial court suppressed defendant Braeseke's confession to Sergeant Cervi—the first confession—because in the court's view a second complete recitation of the *Miranda* warnings was required as a matter of law (ST 72). The trial court refused, however, to suppress any other evidence as a tainted product of that confession (ST 72-77).

The California Supreme Court agreed with our contention that the trial court's reason for suppressing the first confession was incorrect. (25 Cal.3d at 701-702, 602 P.2d at 390, 159 Cal.Rptr. at 690.) The Supreme Court nonetheless sustained the ruling suppressing the first confession because it did not believe that on the facts presented the trial court could have found that the first confession was the product of a knowing and intelligent waiver of defendant's *Miranda* rights. (25 Cal.3d at 701-703, 602 P.2d at 390-391, 159 Cal.Rptr. at 690-691.) The Supreme Court went on to hold that certain other evidence, namely, the rifle, the confession to Deputy District Attorney Cardoza, the statement to Deputy Sheriff Shelton, and the items

seized from defendant's house pursuant to a search warrant, should also have been suppressed as inadmissible fruits of the first confession.[6] (25 Cal.3d at 697-698, 703-704, 602 P.2d at 388, 391-392, 159 Cal.Rptr. at 688, 691-692.) The first degree murder convictions were thereupon reversed.

In reversing the convictions, the California Supreme Court concluded that defendant Braeseke's request to speak "off the record"—a request which was honored—"revealed a marked lack of understanding of the *Miranda* warnings," since one of the warnings is that anything a suspect says can be used against him in a court of law. (25 Cal.3d at 702-703, 602 P.2d at 391, 159 Cal.Rptr. at 691.) This conclusion simply does not follow from the facts.

Defendant Braeseke's request to speak "off the record" was initiated by him after he had been fully advised of his *Miranda* rights, waived them, was questioned, and then later asserted the right to an attorney, an assertion which promptly ended questioning about the killings. Defendant's request to speak "off the record," in light of the warnings

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[6]Because the second confession and the physical evidence in question were found to be admissible, the defense concluded that an acquittal was not possible and that therefore the best defense was one of diminished capacity based upon the use of the drug PCP. Defendant's trial counsel believed that the first confession would contribute to that defense and stipulated to its use at trial on the condition that no appellate rights concerning the rulings made at the suppression hearing would be waived. (RT 3-6; see RT 127-128.)

Although ruled admissible by the trial court, we note that evidence of defendant's conversation with Deputy Sheriff Shelton was not offered at trial.

given him, leads to the ineluctable conclusion that he knew that if he spoke but did not first obtain permission to have the conversation "off the record," then whatever he might say could be used against him in a court of law. There is simply no doubt about this. Clearly knowing his rights, defendant correctly determined that if he were allowed to speak "off the record," then the conversation would not be legally admissible over objection at trial. See *People v. Disbrow*, 16 Cal.3d 101, 106-107, 113, 545 P.2d 272, 275, 280, 127 Cal.Rptr. 360, 363, 368 (1976). Sergeant Cervi understood this too (see ST 21).[7]

Defendant testified at the suppression hearing and, although represented by counsel, never claimed that he had not understood his rights at the time of his first confession (ST 54-58).[8] Interestingly, the California Supreme Court

[7]The California Supreme Court ruled that there can be "no such thing as an off the record discussion," and reproved Sergeant Cervi for having acceded to defendant's request. (25 Cal.3d at 703, 602 P.2d at 391, 159 Cal.Rptr. at 691.) The state court's view is not supported by direct authority in case law or by logic. Moreover, such a restrictive rule could "imprison a man in his privileges," as well as interfere with and even imperil a defendant's Sixth Amendment right to represent himself under *Faretta v. California*, 422 U.S. 806 (1975). *Cf. Michigan v. Mosley*, 423 U.S. 96, 108-109 and n. 1 (1975) (White, J., concurring). The *pro per* defendant would be hampered in his ability to gather information, assess the merits of the case against him, and choose a course of action for himself. These are clearly things that defendant was trying to do by use of the "hypotheticals" he posed "off the record."

[8]Instead, defendant claimed that the first confession was the product of a promise of leniency (ST 56-58). Although the California Supreme Court found it unnecessary to decide this issue (25 Cal.3d at 703 n. 7, 602 P.2d at 391 n. 7, 159 Cal.Rptr. at 691 n. 7), we point out that the state court of appeal found that the claim was "without merit" (154 Cal.Rptr. at 626-627).

failed to acknowledge this in its decision. The logical conclusion to be reached from defendant's testimony at the suppression hearing is that when he gave his first confession he no longer wanted to speak "off the record," but instead wanted to give a "formal statement" (ST 54-58). This view is in accord with the other evidence adduced at the hearing.

The California Supreme Court also concluded that the second confession could not be used to "cure" the "defects" in obtaining the first confession. (25 Cal.3d at 703, 602 P.2d at 391, 159 Cal.Rptr. at 691.) However, the conversation just before the second confession—a conversation preceded by another *Miranda* admonition and full waiver—explained the circumstances at the time of the first confession and made clear that there were no "defects" in obtaining the first confession. The conversation recounted what had been said to defendant regarding his rights prior to the first confession, as well as what defendant understood regarding those rights. Defendant's understanding as set forth there is totally at odds with the California Supreme Court's conclusion that he lacked understanding and therefore could not have knowingly and intelligently waived his *Miranda* protections.

It is settled that "a State may not impose . . . greater [*Miranda*] restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). In *North Carolina v. Butler*, 441 U.S. 369 (1979), this Court recently discussed the question of *Miranda* waiver and held that a waiver of *Miranda* rights need not be explicit but may be

inferred from the actions and words of the person interrogated. See also *Tague v. Louisiana*, 444 U.S. 469 (1980). In so holding, this Court stated:

> "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda,* mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (441 U.S. at 373.)

In his January 31, 1980, order granting our application for a stay, Mr. Justice Rehnquist observed that the California Supreme Court's opinion "comes extraordinarily close to the adoption of a rule that in *no* cases can waiver be inferred from the actions and words of the person interrogated." The California Supreme Court has therefore impermissibly extended *Miranda.*

Defendant Braeseke's rights were "scrupulously honored" under applicable law. See *Michigan v. Mosley, supra,* 423 U.S. at 104. In the words of the dissent, "The conduct of the police was irreproachable." (25 Cal.3d at 704, 602 P.2d at 392, 159 Cal. Rptr. at 692.) "There can be no doubt this twenty-year-old defendant knowingly and intelligently waived his *Miranda* protections." (25 Cal.3d

at 705, 602 P.2d at 392, 159 Cal. Rptr. at 692.) "It would be difficult to imagine more compelling evidence of waiver of one's privilege to sit silent." (25 Cal.3d at 706, 602 P.2d at 393, 159 Cal.Rptr. at 693.)

The California Supreme Court's extension of *Miranda* risks "cut[ting] this Court's holding in that case completely loose from its own explicitly stated rationale." *Beckwith v. United States,* 425 U.S. 341, 345 (1976). This Court should grant review to prevent such a result, as well as the miscarriage of justice which the California Supreme Court's decision has imposed in this case.

II. ASSUMING ARGUENDO A TECHNICAL VIOLATION OF MIRANDA, PHYSICAL EVIDENCE OBTAINED AS THE RESULT OF GOOD FAITH QUESTIONING SHOULD BE ADMISSIBLE.

In *Michigan v. Tucker,* 417 U.S. 433 (1974), this Court refused to exclude testimony of a witness whose identity was discovered as the result of the good faith questioning of a defendant who had not received full *Miranda* warnings. The instant case presents the additional question of whether, assuming *arguendo* a technical violation of the prophylactic rules of *Miranda,* physical evidence obtained as the result of good faith questioning should be admissible. Here, defendant Braeseke led detectives to the rifle used in the three murders. Certain other items, including the chisel used to strike defendant's grandfather, were seized from defendant's residence pursuant to a search warrant.

In deciding in favor of admissibility in *Tucker,* this Court observed:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose. . . . [¶] The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (417 U.S. at 446-447.)

Any arguable law enforcement failure with respect to defendant Braeseke was unquestionably made in complete good faith. Proof of this is amply demonstrated by the fact that after months of consideration, a division of the state court of appeal unanimously concluded that there had been no *Miranda* violation, and three justices of the California Supreme Court called the law enforcement conduct "irreproachable." The deterrence effect of the exclusionary rule would not be significantly augmented by excluding the real evidence along with the confessions. See *Michigan v. Tucker, supra,* 417 U.S. at 447-448.

Another justification for the exclusionary rule is protection of the courts from reliance on untrustworthy evidence. *Michigan v. Tucker, supra,* 417 U.S. at 448. But, objects such as the murder weapon and the chisel with Barker's fingerprints on it can only aid in determining the truth.

For the reasons set forth in *Tucker,* physical evidence obtained as the result of good faith questioning which follows a technical violation of *Miranda* should be admissible.

CONCLUSION

For the foregoing reasons, we respectfully submit that a writ of certiorari should issue to review the judgment of the Supreme Court of California.

Dated: October 20, 1980

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(Appendices Follow)

Appendix A

In the Supreme Court of the State of California

Crim. 21049
Super. Ct.
No. 63100

The People,
Plaintiff and Respondent,
v.
Barry Floyd Braeseke,
Defendant and Appellant.

[Filed Aug. 28, 1980]

The Court:

The Supreme Court of the United States on May 12, 1980, issued its order and judgment that "the judgment of the Supreme Court of California in this cause is vacated, and that this cause is remanded to the Supreme Court of California to consider whether its judgment is based on federal or state constitutional grounds, or both." ..... U.S. ....., 100 S.Ct. 2147.

Pursuant to this mandate we have reexamined our opinion in this case (reported at 25 Cal.3d 691) and certify our judgment is based upon Miranda v. Arizona (1965) 384 U.S. 436 and the Fifth Amendment to the United States Constitution. Inasmuch as we deem it unnecessary to alter our prior opinion, we reiterate it in its entirety.

Appendix B

In the Supreme Court of the State of California

Crim. 21049
Super. Ct. No. 63100

The People,
Plaintiff and Respondent,
v.
Barry Floyd Braeseke,
Defendant and Appellant.

[Filed Nov. 15, 1979]

OPINION

Defendant Barry Floyd Braeseke appeals from a judgment of conviction of three counts of first degree murder (Pen. Code, § 187). The issues presented involve the trial court's ruling on defendant's pretrial motion to suppress various statements made by him, including two confessions, and certain physical evidence. The trial court ruled that the first confession was inadmissible but that the rest of the evidence was admissible. Defendant contends the trial court erred in not suppressing the rest of the evidence on the ground that it was all a product of the first unlawfully obtained confession. The People, however, challenge the propriety of the ruling that the first confession was inadmis-

SEE DISSENTING OPINION

sible, arguing that they are entitled to seek such review under Penal Code section 1252.[1]

On August 24, 1976, at approximately 1 a.m., defendant, who was then 20 years old, summoned Alameda County Sheriff's deputies to his home. There the deputies found the bodies of defendant's mother, father and grandfather; all were dead as the result of multiple gunshot wounds.

In response to questioning by the deputies, defendant said he had last seen his parents and grandfather alive at 9 p.m. when he left the house to go to a movie with his friend David Barker. The deputies noticed that although the master bedroom appeared to have been ransacked, there was no sign of forced entry; also, a number of items that would normally have been taken in a burglary were left untouched.

Defendant was taken to the sheriff's substation where he was interviewed by Sergeants Cervi and Seher shortly after 4 a.m. He related the same version of events he had earlier recounted. The interview ended about 5:15 a.m. Sergeants Cervi and Seher then discussed the case out of defendant's presence. They noted that defendant had blood splattered on his pants leg and that there were inconsistencies between defendant's story and that of his friend David Barker whom the officers had interviewed earlier. The officers therefore decided to conduct a further interview of defendant.

The second interview began about 6 a.m. It was not tape recorded, but defendant was fully advised of his *Miranda*

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[1]Unless otherwise indicated, all section references hereafter are to the Penal Code.

rights. Defendant said he understood his rights and was willing to talk with the officers. When asked about the blood on his pants, defendant stated that it must have been acquired when he was checking the bodies. The officers replied that "splattered" blood would not be the result of having rubbed against a bloody object and that they believed defendant had committed the homicides. At this point defendant said he did not want to discuss the matter further without an attorney present. The questioning ceased, and Sergeant Cervi told defendant that if he wanted to talk at some later time he would have to contact the officers. Defendant was then arrested and booked.

During the booking procedure, Cervi asked defendant for his name, address and date of birth. When he asked defendant the name of his next of kin, defendant fell silent and asked if he could speak with Cervi alone and "off the record" (hereafter referred to as the "off the record statement"). Cervi agreed, and defendant began asking him hypothetical questions: "What if I tell you the rifle was somewhere where some kids may find it?" What would happen to him if he had done all the things the officers had accused him of doing? Cervi replied that he would appreciate any information defendant could give him but that defendant would have to go to jail. Defendant testified that Cervi also told him that "it would be better for [him]" if he gave a statement but that he would have to go to jail anyway.

Cervi then asked defendant, "[C]an I turn the tape recorder on; and can we get a statement from you to that effect?" Defendant said yes, and Cervi turned on the tape recorder at 7:25 a.m., from memory attempted to read-

monish defendant of his Miranda rights, and recorded his statement (hereinafter referred to as Confession No. 1). In response to leading questions by Cervi, which omitted reference to the "off the record" request, defendant acknowledged that he had come forward during the booking procedure and asked to talk to Cervi about the incident. In response to further questions, defendant stated that he was acting voluntarily and was willing to waive his right to have an attorney present. Cervi concentrated on defendant's understanding of his right to counsel and neglected to include in his readmonishment the right to remain silent.[2]

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[2]The transcript of that discussion reads in pertinent part as follows:

"Q. [Cervi] Barry, we have talked previous regarding the fatal shooting of your parents last night, uh, and we actually got to the point where you said you wanted to have a lawyer before you went any farther. Then, during the routine booking and filling out of the arrest form, you asked if you could speak to me; is that correct?

"A. Yeah.

"Q. And you—what I'm saying is that you came forward to me and asked if—asked to talk to me regarding the incident; is this correct?

"A. Yes.

"Q. And you're doing this of your own free will . . .

"A. Hell, yeah; yes.

"Q. . . . being well aware of the fact that you still have the right to have a lawyer present.

"A. Yes, yes.

"Q. To have him pres-present for any and all questioning, and that if you . . .

"A. I understand that.

"Q. And that if you cannot afford to hire one, the courts will appoint one for you.

"A. Yeah, yes.

"Q. Okay, keeping all of this in mind, Barry, would you run down to me what did happen at your house tonight?

"A. I don't know how I can start.

"Q. Let's start with dinner. . . ."

During the formal statement defendant confessed that he and David Barker had murdered his mother, father and grandfather with a .22 caliber rifle. At the conclusion of the formal statement (Confession No. 1) defendant led the officers to the spot where he had hidden the rifle.

About 1 p.m. the same day defendant gave a tape-recorded statement to Deputy District Attorney Michael Cardoza (hereafter referred to as Confession No. 2). Cardoza began by advising defendant of his *Miranda* rights. Defendant said he understood them and was willing to talk. He confirmed the prior sequence of events and stated that he was aware of his *Miranda* rights and understood them at the time he asked to talk to Sergeant Cervi.[3]

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[3]The transcript of that colloquy reads as follows:

"Q. [Cardoza] Now, what I'd like to talk to you about, Barry, is last night. Now earlier this morning, on August 24, 1976, you were in the Sheriff's Office, is that correct?

"A. Yes.

"Q. Prior to talking to the sheriff, you were read some rights, your Miranda rights, weren't you?

"A. Yes.

"Q. All right, those were the same rights that I just read you, is that correct?

"A. Yes.

"Q. At the time that the sheriff read those rights to you, did you understand those rights?

"A. Yes.

"Q. Did he read them to you as I read them to you.

"A. Yes.

"Q. Did he explain them to you?

"A. He didn't need to—I understood them.

"Q. And—correct me if I'm wrong—at that time you told him that you didn't want to talk to him—you wanted your attorney present, is that correct?

"A. Yes.

"Q. And then a booking procedure started where you were being booked into jail, is that correct?

"A. Yes.

"Q. Prior to being booked into jail, that sheriff [sic] officer told you that if you wanted to talk about it some more you would have to re-initiate contact with him—that would mean that

Defendant was again asked whether he was willing to waive his rights and talk; he said he was and again gave a full confession (Confession No. 2). This interview ended at 2:09 p.m.

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if you want to talk more, you'd have to tell him, I want to talk about it, is that correct?

"A. Yes.

"Q. Did you in fact tell him that you wanted to talk to him while you were being booked?

"A. Yes, I did.

"Q. No one forced you to do that, did they Barry?

"A. No.

"Q. Could you keep your voice up, please?

"A. All right.

"Q. How long after you were given the Miranda rights by that sheriff officer early this morning, did you ask to re-talk to the sheriff officer?

"A. About fifteen minutes to half an hour.

"Q. And you remembered these rights, didn't you? You still had those rights in mind?

"A. Yes.

"Q. And there was no confusion in your mind about these rights, was there?

"A. No.

"Q. No one forced you to talk to that sheriff, did they?

"A. No.

"Q. Do you know that sheriff's name that you asked to talk to again?

"A. I would remember, yes.

"Q. Do you know it now?

"A. No, I can't remember it right off hand.

"Q. All right, if we were to give you a name, do you think you would remember it?

"A. Yes.

"Q. How does Serbe [Cervi] sound to you?

"A. That's it.

"Q. All right, you asked to talk to Sergeant Serbe [Cervi]?

"A. Yes.

"Q. And at the time you asked to talk to him, you remembered all these rights that he had given you earlier?

"A. Yes, sir.

"Q. No one forced you to talk to him, did they?

"A. No.

"Q. You wanted to do that?

"A. Yes.

"Q. And you wanted to give up your rights, is that correct?

Defendant made a pretrial motion to suppress his off the record statement to Sergeant Cervi, the two tape-recorded confessions (Confessions No. 1 and 2), the rifle and various items of physical evidence which were allegedly products of the confessions. He also moved to suppress a statement made two days after his arrest on the ground that it too was a product of the earlier confessions. The trial court ruled that the confession to Cervi (Confession No. 1) must be suppressed because it had not been preceded by an adequate *Miranda* warning.[4] (Miranda v. Arizona (1966) 384 U.S. 436.) The rest of the items defendant sought to have suppressed were ruled admissible.

Since defendant's challenge to the latter ruling is premised on the validity of the ruling suppressing the initial

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"A. Yes.
"Q. At that time, prior to talking to Sergeant Serbe [Cervi], did you still understand the rights that he had read you approximately fifteen minutes to a half hour earlier?
"A. Yes, I did.
"Q. And did you have those rights in mind when you asked to talk to him?
"A. Yes.
"Q. And you did re-talk to him, didn't you?
"A. Yes, I did.
"Q. What you told him that time, was that the truth?
"A. Yes, it was.
"Q. OK, Barry. Now, again, I'm going to remind you of your rights, all right? Then I'm going to ask to talk to you about the incident. Would you be willing to talk to me about it?
"A. Yes. . . ."

[4]In view of the pretrial ruling that defendant's second confession was admissible, defendant's trial counsel concluded that defendant's best defense was diminished capacity. He further concluded that defendant's first confession, which had been suppressed, would lend support to that defense since it contained references to defendant's use of the drug PCP. Accordingly, defense counsel stipulated to the admission at trial of the first confession on the condition that the stipulation would not constitute a waiver of defendant's right to challenge on appeal the rulings made at the suppression hearing.

confession, the first question we must decide is whether the People may obtain review of the ruling on the first confession under section 1252. Section 1252 provides in pertinent part: "On an appeal by a defendant, the appellate court shall, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by the Attorney General." This portion of section 1252 was enacted in 1927 as part of the statutory amendments proposed by the Commission for the Reform of Criminal Procedure. (Stats. 1927, ch. 620, § 2, p. 1048; see *The Association's Legislative Program* (1927) 1 State Bar J. 103.) In its report to the Legislature on the proposed amendments, the commission stated: "The additional provision that the appellate court shall pass upon rulings adverse to the State which it is requested to consider by the Attorney General is deemed an important one. At the present time the State has no way to review rulings adverse to it made during the trial. The proposed amendment will give this right, and thus a way will be opened to settle many disputed questions." (Rep. of Com. for Reform of Crim. Proc., Sen. J., p. 163 (1927).)

Despite the statute's broad language and stated purpose, defendant contends that section 1252 does not authorize review of the ruling on the first confession. He relies on People v. Zelver (1955) 135 Cal.App.2d 226; People v. Burke (1956) 47 Cal.2d 45; and People v. Green (1968) 264 Cal.App.2d 614. In *Zelver* defendant was charged with and convicted of three offenses. The trial court granted a new trial as to count II and then dismissed it on its own motion. Defendant appealed from the judgment of convic-

tion on counts I and III; the People sought review under Penal Code section 1252 of the grant of a new trial and dismissal of count II. The Court of Appeal held that the People were not entitled to such review because the ruling was one from which they could have appealed under section 1238, but did not do so: "The statute here involved [section 1252] was intended to give the People the right, on an appeal by the defendant, when a judgment of conviction is reversed, to raise points that might be involved on a retrial. The statute was not designed to give the People a right in the nature of an appeal. The right of appeal is governed by other sections of the code." (People v. Zelver, *supra,* 135 Cal.App.2d at pp. 236-237.)

In People v. Burke, on defendant's appeal from a judgment of conviction, the People sought review under section 1252 of the trial court's order striking a prior conviction. We noted that the People could have appealed from the trial court's order but did not do so and relied on People v. Zelver in holding that section 1252 did not authorize review under such circumstances.

In People v. Green, defendant appealed from a judgment convicting him of two counts of receiving stolen property. The trial court had ruled that defendant's arrest was illegal. The Court of Appeal held that the ruling that the arrest was illegal necessitated a determination that a search of defendant's room was likewise illegal because consent to the search was secured immediately after the illegal arrest and thus was inextricably bound up with it. Although the People attempted to argue on appeal that the search was valid because based upon a lawful arrest, the Court of Appeal, citing *Zelver*, held that it could not

undertake such a review where the result would be affirmance of the judgment of conviction.

Both *Zelver* and *Burke* are distinguishable from the present case in that they involved attempts to raise issues which the People could have had reviewed by exercising their right of appeal. Although the *Green* case may not be so distinguished, it is, in our view, an unwarranted extension of the *Zelver* holding. Neither the language of section 1252 nor the statement of purpose by its drafter suggests that its scope was intended to be limited to authorizing review only when a judgment is being reversed.

The present situation is one which the Legislature may well have had in mind when it added this provision to section 1252. Since an appeal by the People is not authorized in this instance, an interpretation of section 1252 as precluding review of the order suppressing the initial confession would result in that order being binding on us even if clearly erroneous. Such a result would be patently unreasonable here where defendant's challenge to the admissibility of the subsequent confession and other evidence is premised on the validity of the ruling that the first confession was inadmissible. Thus, if the trial court erred in ruling that the first confession was inadmissible, it follows that the second confession was admissible and that the trial court's ruling to that effect was correct, even though based upon erroneous reasoning. To preclude the People from making this argument would be contrary to the rule that a correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasons. (See People v. Grana (1934) 1 Cal.2d 565, 571; People v.

Towner (1968) 259 Cal.App.2d 682, 685; Davey v. Southern Pac. Co. (1897) 116 Cal. 325, 329; D'Amico v. Bd. of Med. Examiners (1974) 11 Cal.3d 1, 19; Witkin, Cal. Criminal Procedure, Appeal, § 682, pp. 665-666; 6 Witkin, Cal. Procedure (2d ed.) Appeal, § 226, pp. 4215-4216.) To preclude review of an erroneous ruling on the admissibility of the first confession would also be contrary to the constitutional provision permitting judgments to be reversed only when a miscarriage of justice has occurred. (Cal. Const., art. VI, § 13.)

Accordingly, we conclude that the People may, on an appeal by the defendant and pursuant to the provisions of section 1252, obtain review of allegedly erroneous rulings by the trial court in order to secure an affirmance of the judgment of conviction.[5] Our conclusion is consistent with the rule regarding review of points raised by the respondent in civil appeals. (See Code Civ. Proc., § 906; 6 Witkin, Cal. Procedure (2d ed.) Appeal, §§ 215-217, pp. 4205-4208; *Selected 1957 Code Legislation* (1957) 32 State Bar J. 556-557; see also Traynor, *Some Open Questions on the Work of State Appellate Courts* (1957) 24 U.Chi. L.Rev. 211, 220.) It is also consistent with the holding in the *Zelver* and *Burke* cases where review was denied because the People had an independent right of appeal which they failed to exercise and sought to raise error for purposes other than securing an affirmance of the judgment. We disapprove People v. Green, *supra*, 264 Cal.App.2d 614, to the extent it is inconsistent with this opinion.

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[5]The People may, of course, also obtain review of questions likely to arise on retrial when a judgment of conviction is reversed. (See People v. Zelver, *supra*, 135 Cal.App.2d at pp. 236-237; People v. Burke, *supra*, 47 Cal.2d at p. 54.)

We turn to the question of the correctness of the ruling that defendant's first confession was inadmissible. The People contend the trial court erred in excluding the confession on the ground that the *Miranda* warnings were inadequate. Defendant, on the other hand, contends that even if the trial court's reasoning on the *Miranda* warnings was incorrect, its ruling must nevertheless be upheld if there is any basis in the record to sustain it. (See People v. Rios (1976) 16 Cal.3d 351, 356; People v. Towner, *supra*, 259 Cal.App.2d at p. 685; Witkin, Cal. Criminal Procedure, Appeal, § 682, pp. 665-666.) On this record we agree with both contentions but, as we shall show, we conclude that the trial court's ruling on the first confession must be sustained because there is no evidence from which the trial court could have found beyond a reasonable doubt that the confession was the product of a knowing and intelligent waiver of defendant's *Miranda* rights. (See People v. Jiminez (1978) 21 Cal.3d 595.)

A *Miranda* warning is not required before each custodial interrogation; one warning, if adequately and reasonably contemporaneously given, is sufficient. (People v. Johnson (1969) 70 Cal.2d 469, 477; People v. Bynum (1971) 4 Cal.3d 589, 600.) Defendant was given proper *Miranda* warnings only an hour and a half before the incomplete readmonishment immediately preceding the confession. The warnings given appear sufficient. (See People v. Duren (1973) 9 Cal.3d 218, 241-242.) There remains, however, the question whether defendant knowingly and intelligently waived his *Miranda* rights.

It is beyond dispute that once a defendant has asserted his right to counsel the interrogation must cease. (People v. Fioritto (1968) 68 Cal.2d 714, 718-719; People v. Pet-

tingill (1978) 21 Cal.3d 231, 237-241.) It may not be resumed without counsel unless compelling evidence of a waiver of the suspect's rights appears. (Cf. Miranda v. Arizona, *supra*, 384 U.S. at p. 474; People v. Randall (1970) 1 Cal.3d 948, 956.) Even when the defendant has not asserted his right to counsel, a "heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (Miranda v. Arizona, *supra*, 384 U.S. at p. 475.) When, as here, the defendant has asserted his right to the presence of an attorney that burden is particularly onerous (People v. Randall, *supra*, 1 Cal.3d at p. 958; cf. People v. Brockman (1969) 2 Cal.App.3d 1002, 1007-1008) and usually is discharged only by a showing that the defendant initiated without reservation the renewed interrogation. (See People v. McDaniel (1976) 16 Cal.3d 156, 172; People v. Randall, *supra*, 1 Cal.3d at p. 956.) In the present case defendant did not unreservedly institute the renewed interrogation, and the People did not in any other way discharge the heavy burden imposed upon them by *Miranda*. A request to speak "off the record" cannot constitute a knowing and intelligent waiver of rights which include the advisement that "anything [a suspect] says can be used against him in a court of law." (Miranda v. Arizona, *supra*, 384 U.S. at p. 479; cf. People v. Nudd (1974) 12 Cal.3d 204, 207; People v. Disbrow (1976) 16 Cal.3d 101, 105-106.) Indeed, defendant's request revealed a marked lack of understanding of the *Miranda* warnings.[6] (Cf. People v. Skinner (1965) 235

[6]Thus, even if it be assumed that defendant was attempting to condition his discussion with Cervi, the assumption simply underscores defendant's lack of understanding rather than establishing the invalidity of the request.

Cal.App.2d 16.) Sergeant Cervi then contributed to defendant's lack of understanding by agreeing to the request rather than informing defendant that there could be no such thing as an off the record discussion. (Cf. People v. Honeycutt (1977) 20 Cal.3d 150, 158-161.)

In view of the lack of any credible evidence that defendant's initiation of the conversation with Sergeant Cervi constituted a knowing and intelligent waiver of his *Miranda* rights, we must conclude that the continued interrogation of defendant was in violation of *Miranda* and that the confession resulting therefrom is inadmissible.[7] (See People v. Pettingill, *supra*, 21 Cal.3d at pp. 237-241; People v. Disbrow, *supra*, 16 Cal.3d at pp. 105-106; People v. Randall, *supra*, 1 Cal.3d at p. 958; People v. Fioritto, *supra*, 68 Cal. 2d at p. 719.) The lack of a knowing and intelligent waiver by defendant of his *Miranda* rights makes the present situation similar to that in People v. Pettingill, *supra*, 21 Cal.3d 231, and the line of cases discussed therein where police improperly continued interrogating a suspect after he had invoked his rights under *Miranda*. As in those cases, it is immaterial that the continued interrogation was preceded by another advisement of *Miranda* rights. Nor do we believe that anything that occurred in the course of defendant's second confession, which clearly was a product of his first confession, can "cure" the defects in the method by which defendant's first confession was obtained.

Defendant contends that the trial court erred in not suppressing his subsequent statements and certain physical

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[7]In light of this conclusion it is unnecessary to decide whether the first confession was also inadmissible because it was the product of a promise of leniency.

evidence as products of the first confession. "The fruits of an illegally conducted interrogation are no less inadmissible during the trial of the declarant than his statements themselves." (People v. Schader (1969) 71 Cal.2d 761, 778; see also People v. Buchanan (1966) 63 Cal.2d 880, 887.) Absent prosecution evidence showing a break in the causative chain between *seriatim* confessions, there is a presumption that the subsequent confessions were the product of the same improper police conduct which induced the first confession. (People v. Spencer (1967) 66 Cal.2d 158, 165-168; People v. Johnson (1969) 70 Cal.2d 541, 547; People v. Sanchez (1969) 70 Cal.2d 562, 574; People v. McClary (1977) 20 Cal.3d 218, 229-230.)

The prosecution presented no evidence showing a break in the causative chain between defendant's first confession, the seizure of the rifle following that confession, the second confession the same day, and a statement by defendant two days later that he didn't mean to kill his family.

The improper introduction of a confession constitutes reversible error. (People v. Pettingill, *supra*, 21 Cal.3d 231; People v. McClary, *supra*, 20 Cal.3d at p. 230; People v. Randall, *supra*, 1 Cal.3d at p. 958; People v. Fioritto, *supra*, 68 Cal.2d at p. 720.)

The judgment is reversed.

MANUEL, J.

WE CONCUR:

BIRD, C.J.
TOBRINER, J.
NEWMAN, J.

DISSENTING OPINION BY CLARK, J.

How did the constable blunder? What did the officers do that they should not have done? What should have been done that was left undone?

The conduct of the police was irreproachable. Therefore, the lesson ("prophylactic effect") derived from today's decision can only be that this court no longer accepts convictions based on voluntary confessions.[1] This despite the fact that many convicted criminals (few criminals, of course, are convicted) would go free but for confessions. Worse, recognition that some desire to tell the truth—and should be permitted to do so—escapes the majority of our court.

There can be no doubt this twenty-year-old defendant knowingly and intelligently waived his *Miranda* protections. As soon as the officers had reason to suspect defendant of the murders they fully advised him of his *Miranda* rights. He responded that he understood his rights and was willing to speak to the officers. When defendant subsequently invoked his rights and stated he did not wish to talk further without an attorney present, the officers immediately terminated the interview, told defendant they could not question him further, and advised he would have to reinitiate communication if he later wished to speak to them.

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[1]For recent cases manifesting our court's attitude toward confessions, see People v. Jimenez (1978) 21 Cal.3d 595; In re Michael C. (1978) 21 Cal.3d 471, judgment reversed and cause remanded *sub nomine*, Fare v. Michael C. (20 June 1979) U.S. [47 U.S.L.Week 4771]; People v. Pettingill (1978) 21 Cal.3d 231.

Defendant was then arrested. While being booked he asked to speak with Officer Cervi alone and "off the record." This request was granted and when alone, defendant asked Cervi certain hypothetical questions regarding what would happen if he were in fact responsible for the murders. Cervi told defendant he would have to go to jail, but that it would be better for him if he gave Cervi a statement. Cervi then asked defendant if he were willing to give a tape recorded statement, and defendant agreed to do so. At commencement of the statement defendant was reminded he had previously refused to talk further without an attorney. Defendant acknowledged this was the case and also admitted he had subsequently asked to talk further with Cervi. Defendant also stated he was acting voluntarily and was still aware of his right to have an attorney present. Cervi did not readvise defendant of his right to remain silent or of the privilege against self-incrimination, but, as the majority concede (*ante*, p. .....*), repeating these rights was unnecessary in light of the complete admonition given him less than two hours earlier. Defendant then detailed his crimes.

A few hours later defendant gave a taped statement to a deputy district attorney. Defendant was again given the *Miranda* admonition and again stated he understood it and was willing to waive its protection. He acknowledged he had previously been advised of these rights, had understood them at that time, had stated he did not wish to talk without an attorney present and had then been advised that if he wanted to talk further, he would have to reinitiate discussion with the officers. Defendant affirmed he had

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*Majority opinion, page 16. [Page A-12.]

later told Officer Cervi he wished to speak to him, that he had acted voluntarily in reinitiating communication with the officer, and he had done so with his *Miranda* rights in mind. Defendant was again asked whether he was willing to waive his *Miranda* rights, stated he was and again gave a full description of his crimes.

It would be difficult to imagine more compelling evidence of waiver of one's privilege to sit silent. Conversely, defendant's desire to describe his conduct to those charged with its solution is clear and should not be frustrated by our court.

Defendant's conviction for these grave crimes—cold-blooded murder of his father, mother and grandfather to secure his inheritance—should be affirmed.

CLARK, J.

WE CONCUR:

MOSK, J.
RICHARDSON, J.

Appendix C

Certified for Publication

In the Court of Appeal of the State of California

First Appellate District

Division Two

1 Crim. No. 17213
(Sup.Ct.No. 63100)

People of the State of California,
Plaintiff and Respondent,

v.

Barry Floyd Braeseke,
Defendant and Appellant.

[Filed Apr. 17, 1979]

OPINION

Defendant Barry Braeseke appeals from a judgment convicting him of the first degree murder of his mother, father and grandfather, in violation of section 187 of the Penal Code. The appeal presents the following issues for resolution: (1) On this appeal by the defendant, may the People challenge allegedly erroneous rulings by the trial court? (2) Were defendant's two confessions and the physical evidence obtained as a result of such confessions inadmissible due to an inadequate *Miranda* warning or because they were improperly induced by the interrogating officer?

At approximately 1 a.m. on August 24, 1976, Alameda County sheriff's deputies were summoned to defendant's home on Betlen Drive in Dublin. When the deputies arrived, defendant, who was 20 years old, came out onto the front porch and asked them to "please hurry." They followed defendant into the family room and found the bodies of defendant's mother, father and grandfather. Defendant's father had died as the result of three gunshot wounds in the head; his mother as the result of gunshot wounds in the head and the abdomen; and his grandfather as the result of multiple gunshot wounds in the head. Defendant's grandfather had also sustained head injuries caused by blows from a blunt instrument.

Sheriff's Deputy Lockhart talked to defendant at the scene and asked him when he had last seen his parents alive. Defendant replied that he had left the house with a friend, Dave Barker, at 9 p.m. and that at that time, his parents and grandfather were alive. Defendant said that he and Barker had visited a friend in Hayward and had then gone to a drive-in movie. After driving Barker home, defendant returned to his own home and entered the front door, which was unlocked. Defendant stated that he called out to announce that he was home, received no response and then went into the family room where he found the three bodies. According to defendant, he ran immediately to the home of a neighbor and asked her to call an ambulance. Defendant then ran back to his own home and telephoned the sheriff's department.

In the course of their investigation at the homicide scene, the sheriff's deputies observed that the master bed-

room gave the appearance of having been ransacked, in that various drawers had been turned upside-down. However, the deputies began to doubt that a burglary had occurred when they were unable to find any sign of a forced entry and when they also discovered that various items usually taken in a burglary, such as small appliances, cash and credit cards, had been left in plain view on the premises.

Defendant was transported to the sheriff's substation in San Leandro, where he was interviewed by Detective Cervi and Sergeant Seher shortly after 4 a.m. In his statement, which was tape recorded, defendant adhered to the same version of events he had earlier recounted to Deputy Lockhart, stating that he had gone out for the evening at 9 p.m. and had returned home around 1 a.m. to find the bodies of his parents and grandfather. This interview concluded at 5:15 a.m.

Following their initial interview with defendant, Detective Cervi and Sergeant Seher discussed the case. Seher pointed out that he had observed what appeared to be spattered blood on defendant's pants legs. The two officers had also interviewed defendant's friend, Dave Barker, and had noticed certain inconsistencies between his story and that of the defendant. The two officers decided to conduct a further interview of defendant.

The second interview with defendant commenced at approximately 6 a.m. It was not tape recorded, but Detective Cervi and Sergeant Seher both testified that defendant was first advised of his *Miranda* rights and stated that he understood them and was willing to talk to the officers.

Defendant then began to repeat his exculpatory version of the facts until he was asked about the blood on his pants. He replied that the bloodstains must have been acquired when he was checking the bodies of his parents. The officers pointed out to defendant that the blood was "splattered" on his pants and that this condition could not have been caused by defendant's having rubbed against a bloody object at the scene. Sergeant Seher told defendant that he did not believe his story and thought that he had committed the homicides. At this point, defendant stated that he did not want to talk further without an attorney present. Detective Cervi promptly advised defendant that the officers were precluded from questioning him further and that if he wished to talk to them at some later time, defendant would have to contact the officers and so state. Defendant was placed under arrest and booked.

During the booking process, Cervi asked defendant for his name, address and date of birth. He asked defendant the name of his next of kin, at which point defendant first fell silent and then asked if he could talk to Detective Cervi alone. Sergeant Seher departed, and Cervi accompanied defendant to an office a short distance down the hall. Defendant stated that he wanted to talk to Cervi "off the record." He began asking Cervi hypothetical questions: "[W]hat if I told you the rifle was somewhere some kids might find it or where they might get hurt?" What would happen to him if he had done all the things the officers had accused him of doing? Cervi testified that he responded to these questions by telling defendant that he would appreciate any information which defendant might

furnish, but that defendant would have to go to jail and that there was no other alternative.[1]

Cervi then asked defendant whether he was willing to give a formal, recorded statement, and defendant agreed to do so. Cervi turned on the tape recorder at 7:25 a.m. He first reminded defendant that during a previous interview, defendant had stated that he was unwilling to talk further without an attorney. Defendant agreed that this was the case and also agreed that during the booking procedure, he had asked Cervi if he could discuss the homicides with him further. In response to further questions by Cervi, defendant stated that he was acting voluntarily and that he was still well aware of his right to have an attorney present. Defendant then gave a full confession. He stated that he and his friend, Dave Barker, had discussed the idea of killing defendant's parents over a period of weeks. Defendant claimed that, frequently, he had been high on "crystal" during this period of time. He stated that the subject of killing his parents first arose when he bragged to Barker that his parents were rich and that since he was an only child, all of their money and insurance would go to him in the event of their death. According to defendant, Barker brought up the subject of killing defendant's parents on numerous occasions, urging defendant to go through with it and offering to assist him. On the previous day, August 23, Barker had been particularly insistent, and defendant ultimately told him that he was ready to commit the murders. Defendant stated that he

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[1]Defendant, testifying at the pretrial hearing on his motion to suppress evidence, admitted that Cervi told him that he would have to go to jail. However, defendant testified that Cervi also told him that it "would be better for [defendant]" if he gave Cervi a statement.

first shot his father with a .22 caliber rifle and then shot his mother. Defendant then urged Barker to kill his grandfather, and when Barker hesitated, defendant threw his grandfather on top of his mother's body and ordered Barker to hit him. Barker began striking defendant's grandfather with a chisel, and defendant then handed him the rifle. Barker shot and killed the grandfather.

Defendant told Cervi that he and Barker had attempted to make the house look as though it had been ransacked, they drove off in defendant's car. They took with them the .22 rifle and certain items of personal property from defendant's house, including the wallets of defendant's parents. After first hiding the rifle under a bridge near Eden Canyon, defendant and Barker went to a drive-in movie. Defendant then drove Barker to his home, where the latter agreed to hide the various items of stolen personal property in his backyard. The interview was concluded at 7:55 a.m., after defendant agreed to show the sheriff's deputies where the rifle was hidden.

Defendant left the sheriff's substation with two deputies and directed them to the spot where he had hidden the rifle.

Following his return to the substation, defendant agreed to allow urine and blood samples to be taken so that they could be tested for alcohol or drug content. He advised Detective Cervi that he had not taken "crystal" or any other drug for 24 hours before the homicides.

At approximately 1 p.m., defendant gave a tape recorded statement to Deputy District Attorney Michael Cardoza. Defendant was first advised of his *Miranda* rights and stated that he understood them and was willing to waive

them. He admitted that he had previously been advised of these rights, had understood them at that time, had stated that he did not wish to talk without an attorney present and had then been advised that if he wanted to talk further, he would have to reinitiate contact with the sheriff's deputies and tell them that he wished to talk to them. Defendant said that he had, in fact, later told Detective Cervi, during the booking procedure, that he had made this statement voluntarily and with his *Miranda* rights in mind. Defendant was again asked whether he was willing to waive his *Miranda* rights, stated that he was and again gave a full confession. This final interview was concluded at 2:09 p.m.

Defendant made a pretrial motion to suppress his "off the record" statement to Detective Cervi and the two tape recorded confessions subsequently made to Cervi and to Assistant District Attorney Cardoza. Also, defendant sought to suppress various items of physical evidence which were allegedly the product of his confessions. The trial court ruled that it would suppress defendant's tape recorded confession to Cervi on the ground that it had not been preceded by an adequate recitation of defendant's *Miranda* rights. In all other respects, the suppression motion was denied.[2]

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[2]In view of the pretrial ruling that defendant's second confession was admissible, defendant's trial counsel concluded that defendant's best defense was diminished capacity. He further concluded that defendant's first confession, which had been suppressed, would lend support to that defense, since it contained references to defendant's use of the drug "crystal." Accordingly, defense counsel stipulated to the admissibility at trial of the first confession on the condition that such stipulation would not constitute a waiver of defendant's right to challenge, on appeal, the rulings made at the suppression hearing.

Defendant contends that this court may not review the trial court's ruling made at the suppression hearing, that defendant's first tape recorded confession to Cervi was inadmissible; further, he argues that if said ruling is reviewable by this court, it must be upheld because the evidence at the suppression hearing supports the trial court's determination. Defendant also argues that if the first confession was inadmissible, it follows, as a matter of law, that the second confession to Cardoza was the product of the first confession and likewise inadmissible. He contends that the rifle should have been held inadmissible, since its discovery was the direct result of the first confession, and that various items of physical evidence obtained in a search of his home should similarly have been excluded because the warrant authorizing that search was based upon defendant's two confessions. Finally, defendant asserts that under the recent decision in *People v. Jimenez* (1978) 21 Cal.3d 595, he is entitled to a reversal of the judgment of conviction and a redetermination of the admissibility of the second confession because the record does not affirmatively demonstrate that the trial court utilized the beyond a reasonable doubt standard of proof in ruling upon the voluntariness of the second confession.

We first consider the question of whether this court is empowered to review the trial court's determination that defendant's first confession to Detective Cervi was inadmissible.

Section 1252 of the Penal Code was amended in 1927 to add the following provision: "On an appeal by a defendant, the appellate court shall, in addition to the issues raised

by the defendant, consider and pass upon all rulings of the trial court adverse to the state which it may be requested to pass upon by the attorney general." (Stats. 1927, ch. 620, § 2, p. 1048.)

Although, on its face, this language appears to be quite broad in application, it has been given a more narrow judicial construction. In *People v. Zelver* (1955) 135 Cal.App.2d 226, the defendant was charged with and convicted of three offenses. The trial court concluded that two of the offenses were not severable, and granted a new trial on Count II of the indictment, then dismissed that count on its own motion. On defendant's appeal from the judgment of conviction, the Attorney General sought review of the orders which granted a new trial as to Count II and then dismissed that count. The appellate court held that, although these orders were erroneous, section 1252 of the Penal Code did not authorize the People to seek review of same where the defendant alone had appealed and where the result of said appeal was affirmance of the judgment of conviction. The court pointed out that the People's right to appeal was governed by section 1238 of the Penal Code and that the People could have appealed from the order granting a new trial as to Count II, but had failed to do so. The court then went on to state: "[Section 1252] was intended to give the People the right, on an appeal by the defendant, when a judgment of conviction is reversed, to raise points that might be involved on a retrial. The statute was not designed to give the People a right in the nature of an appeal. The right of appeal is governed by other sections of the code. Thus, although the ruling of the trial court was adverse to the People and erroneous, we have

no power on the appeal by the defendant where an affirmance results, to rectify it by reversing or modifying the judgment in favor of the People." (Pp. 236-237.)

The *Zelver* holding was followed by the California Supreme Court in *People v. Burke* (1956) 47 Cal.2d 45, where the defendant had appealed from a judgment of conviction and the Attorney General sought review of the trial court's order striking a prior conviction. The Supreme Court pointed out that the People could have filed their own appeal from the order in question and rejected the Attorney General's contention that the order was reviewable under section 1252 of the Penal Code. The court quoted with approval the language from the *Zelver* case which is set forth above.

The *Zelver* holding was again followed in *People v. Green* (1968) 264 Cal.App.2d 614, where the defendant appealed from a judgment convicting him of two counts of receiving stolen property. The trial court had ruled that the defendant's arrest was illegal. The appellate court held that this finding necessitated a determination that a search of the defendant's room was likewise illegal because consent to the search was secured immediately following the illegal arrest and was inextricably bound up with the arrest. Although the Attorney General attempted to argue on appeal that the search was valid because based upon a *lawful* arrest, the appellate court, citing *Zelver,* held that it could not review the trial court's ruling that the arrest was illegal where the result of such review would be affirmance of the judgment of conviction.

The Attorney General argues that the *Zelver* and *Burke* decisions are both distinguishable because they involved situations where the People could have obtained the desired appellate review by exercising their own right of appeal, whereas in this instance, there was no avenue of appeal open to the People. While the Attorney General tacitly concedes that *People v. Green, supra,* may not be so distinguished, he takes the position that that case was incorrectly decided in that it ignores the plain language of the 1927 amendment to section 1252 of the Penal Code. He finds compelling evidence of legislative intent in an excerpt from the Journal of the Senate (1927) at page 163: "The additional provision that the appellate court shall pass upon rulings adverse to the State which it is requested to consider by the Attorney General is deemed an important one. At the present time the State has no way to review rulings adverse to it made during the trial. The proposed amendment will give this right, and thus a way will be opened to settle many disputed questions."

This case appears to present precisely the situation which the Legislature had in mind when it adopted the 1927 amendment to section 1252. Section 1238 of the Penal Code does not authorize an appeal by the People in this instance, therefore, if section 1252 is so interpreted as to preclude review of the order suppressing defendant's initial confession to Cervi, such order is binding upon this court even if clearly erroneous as a matter of law. Under the circumstances of this case, such a result is patently unreasonable. Here, the trial court held that the first confession to Cervi was inadmissible, but that the second confession to Cardoza was not, presumably because the

court concluded that the second confession was not infected by or the product of the first. If the trial court erred in ruling that the first confession was inadmissible, it follows that the second confession was admissible and that the trial court's ruling to that effect was correct, even though based upon erroneous reasoning. Therefore, to preclude the Attorney General from making this argument would be contrary to the rule that a correct decision by the trial court must be upheld on appeal, even though based upon erroneous reasons. (*People v. Towner* (1968) 259 Cal.App. 2d 682, 685.) To preclude review of an erroneous ruling on the admissibility of the first confession would also violate that provision in the California Constitution which permits reversal of a judgment only for a miscarriage of justice. (Cal.Const., art. VI, § 13.)

Accordingly, we conclude that where the People have no independent right of appeal under section 1238 of the Penal Code, they may, on an appeal by the defendant and pursuant to the provisions of section 1252 of the Penal Code, obtain review of erroneous rulings by the trial court in order to obtain an affirmance of the judgment of conviction. Our conclusion in this regard is not contrary to the *Zelver* or *Burke* holdings, since both cases involved situations where the People did have an independent right of appeal, but failed to exercise same. To the extent that our determination is contrary to the reasoning of the *Green* case,[3] we have concluded that *Green* ignores the plain language of section 1252 by unduly restricting the

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[3]The correctness of the holding in *People v. Green* (1968) 264 Cal.App.2d 614, was apparently questioned in *People v. Magana* (1969) 272 Cal.App.2d 388, 389, fn. 1.

People's right to obtain appellate review of erroneous trial court rulings unfavorable to the People; also, that it leads to the improper result of reversing a judgment of conviction where there has been no miscarriage of justice.

The substantive issue to be resolved is whether the trial court erred in ruling that defendant's first confession to Cervi was inadmissible.

When announcing that it would suppress the first confession, the court stated that it was basing its ruling upon the fact that "there was inadequate admonition as to [defendant's] Miranda rights . . . ." However, the court had also indicated previously that it believed defendant's testimony that Cervi had told him that "it would be better for [him]" if he gave a statement.[4] Thus, the trial court's decision to suppress the first confession must be upheld if the record supports a determination either that the first confession was obtained in violation of defendant's *Miranda* rights or as the result of improper inducement by Cervi. In resolving these questions, it is the duty of an appellate court to examine the uncontradicted facts and determine, independently, whether the confession was voluntary, hence admissible. (*People v. Jimenez, supra,* 21 Cal.3d at p. 609; *People v. McClary* (1977) 20 Cal.3d 218, 227; *People v. Sanchez* (1969) 70 Cal.2d 562, 571-572.)

The record reveals that defendant was fully advised of his *Miranda* rights at 6 a.m. at the commencement of the second interview jointly conducted by Detective Cervi and

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[4]Defendant's testimony in this regard was never contradicted by Detective Cervi. Although the prosecutor indicated at one point that he intended to recall Cervi for that purpose, he failed to do so.

Sergeant Seher. During the course of that interview, after the officers had confronted defendant with the splattered blood on his pants and Seher had told him that he did not believe his story, defendant invoked his *Miranda* rights and stated that he did not want to talk further without the presence of an attorney. The officers immediately terminated the interview and told defendant that they could not question him further and that defendant would have to reinitiate contact with them if he later decided that he wished to talk to them again.

Defendant was then arrested. While in the process of being booked, he asked to talk to Cervi alone and "off the record." This request was granted, and when they were alone, defendant asked Cervi certain hypothetical questions concerning what would happen if he were in fact responsible for the homicides. Cervi told defendant that he would have to go to jail, but that it would be better for him if he gave Cervi a statement. Cervi then asked defendant if he was willing to give a tape recorded statement, and defendant agreed to do so. At the commencement of his statement, defendant was reminded that he had previously refused to talk further without an attorney. Defendant acknowledged that this was the case and also admitted that he had subsequently asked to talk further with Cervi. Defendant also stated that he was acting voluntarily and was still aware of his right to have an attorney present. Cervi did not readvise defendant of his right to remain silent or of the privilege against self-incrimination. Defendant then gave the first confession.

There is ample authority for the proposition that a *Miranda* warning is not required before each custodial interrogation of a suspect by the police; that one such warning, adequately given, is sufficient for subsequent interrogations. (*People v. Johnson* (1969) 70 Cal.2d 469, 477; *People v. Sievers* (1967) 255 Cal.App.2d 34, 37-38.) However, it is also the rule that where a suspect is given a *Miranda* warning and invokes his rights by refusing to talk to the police without an attorney, a subsequent admission or confession given by the suspect will be held admissible only if the subsequent interview was voluntarily initiated by the suspect and there was no evidence of coercion, pressure, compulsion or any suggestion of leniency. (*People v. Brockman* (1969) 2 Cal.App.3d 1002, 1007-1011; *People v. Duran* (1969) 269 Cal.App.2d 112, 116-117.)

For his second point, defendant relies upon such cases as *People v. Brommel* (1961) 56 Cal.2d. 629, 632, and *People v. Russell* (1968) 259 Cal.App.2d 637, 646, as authority for the proposition that a statement by the police that "it would be better for" a suspect to make a full disclosure or tell what he knows, renders a subsequent confession or admission involuntary as a matter of law. In *Brommel,* the interrogating officer did not confine himself to advising the defendant that it would be better for him to tell the truth, but also told him that if he refused to admit his complicity in the offense, he would be branded a liar in the eyes of the trial judge, would not be believed in anything he said, and would be accorded no leniency whatever. (P. 633.) *Russell* involved a situation where the giving of a *Miranda* warning to the defendant was immediately followed by the suggestion that it might be better

for the defendant if he talked. (P. 644.) Since this suggestion was given as a supplement to the *Miranda* warning, the appellate court concluded that at the very least, it qualified the *Miranda* warning and rendered it unclear. (Pp. 645-646.) The court was also of the opinion that even if the suggestion that it would be better for the defendant if he talked were viewed as a separate inducement which did not detract from the *Miranda* warning, it nevertheless constituted improper conduct on the part of the officer and rendered the defendant's statement inadmissible. The court stated, "The words 'it might be better for you' when made, as in this case, to a suspect in the isolation of an interrogation room can too easily be interpreted as an implied threat or cajolery to be equated with a statement whose sole purpose is to point out to the suspect the benefit which 'follows naturally from a truthful and honest course of conduct.'" (P. 646.)

On the other hand, the mere statement to a suspect that it would be better for him to tell the truth, when unaccompanied by any threat or promise, does not render a subsequent confession involuntary. (*People v. Jimenez, supra,* 21 Cal.3d at p. 611; *People v. Hill* (1967) 66 Cal.2d 536, 549; *People v. Ditson* (1962) 57 Cal.2d 415, 432; *People v. Nelson* (1964) 224 Cal.App.2d 238, 250.) In *People v. Hill, supra,* at page 549, the California Supreme Court stated the rule simply and succinctly: "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing

benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible."

In this instance, we hold that, since defendant had been recently and fully advised of his Miranda rights, Detective Cervi was not required to repeat such admonition after defendant voluntarily asked to talk with Cervi privately. In our view, this determination finds support in defendant's statements made immediately prior to his second confession to Cardoza, wherein he acknowledged that he had understood his *Miranda* rights and had had them in mind when he initiated the "off the record" discussion with Cervi.

Also, we conclude that defendant's claim that his confession to Cervi was involuntary because induced by a promise of leniency is without merit. At that point in time when Cervi suggested to defendant that it would be better for him to give a truthful statement, Cervi, in response to a hypothetical question posed by defendant, had just stated that even if defendant cooperated with the deputies and admitted his complicity in the homicides, there was still no alternative to his going to jail. Viewed in this context, the remark that it would be better for defendant to give a statement could not reasonably have been interpreted by defendant as a promise of leniency; simply a suggestion that it is a good thing to tell the truth. A statement of this nature does not render a confession involuntary and

inadmissible. This situation is clearly distinguishable from *People v. Russell, supra,* 259 Cal.App.2d 637. Here, Detective Cervi's statement was not given as a supplement to a *Miranda* warning and cannot be viewed as qualifying such warning. Defendant had previously been given the *Miranda* admonition, had invoked his right not to talk further with the officers and had then voluntarily initiated a conversation with Cervi after the prior questioning had been terminated. Also, in *Russell,* the suggestion that it would be better for the defendant to talk was not preceded by any statement to the effect that telling the truth would gain the defendant no benefit in terms of more lenient treatment and that he would have to go to jail in any event.

We are also of the opinion that the defendant had arrived at his own independent decision to confess when, during the course of the booking process, he was asked to name his next of kin. According to Cervi's uncontradicted testimony, defendant responded to this question by momentarily falling silent and then asking to talk to Cervi alone. When this request was granted, defendant immediately began propounding hypothetical questions indicative of his guilt. Undoubtedly, Cervi's routine and innocuous questions precipitated a normal human reaction: momentary silence when defendant then realized that he had murdered his next of kin. Understandably, the stark reality of this monstrous deed prompted a strong desire to unburden himself on someone. Cervi did nothing to improperly induce or coerce a confession; he merely allowed events to pursue an inevitable course. His admonition to defendant that it would be better to give a statement, when considered in context with his warning that, in any event, defendant would go

to jail, could not reasonably constitute any form of psychological or other unlawful inducement to confess. Thus, defendant's first confession was not the product of improper or illegal conduct on the part of Cervi; instead, it found its independent origin in defendant's deep feelings of guilt. Contrary to the trial court's determination, that confession was freely and voluntarily given, hence admissible into evidence.

Our determination that defendant's first confession to Cervi was admissible establishes that the trial court was correct in admitting the second confession into evidence, even though the court may have based its ruling upon erroneous reasons. Defendant's sole basis for attacking the second confession is that it was the product of a prior confession which was inadmissible because improperly induced. Since we have concluded that this latter premise is unsound, it is evident that the second confession was properly admitted. The same reasoning defeats defendant's claim that the trial court erred in admitting the rifle and the physical evidence seized in the search of his home. Here again, defendant's argument is based upon the erroneous premise that the two confessions were inadmissible and that the rifle and other items of physical evidence were inadmissible because they were products of such confessions.

We have also concluded that there is no merit to defendant's contention that the record does not affirmatively establish that the trial court applied the beyond a reasonable doubt standard in ruling upon the admissibility of the confessions, as mandated by *People v. Jimenez, supra,* 21 Cal.3d 595. The *Jimenez* court stated, "since any error as

to the standard of proof applied in determining the voluntariness of a confession relates only to a question of preliminary fact, we have concluded that the effect of any such error should be measured in accordance with the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 837 [299 P.2d 243]; thus when it appears after looking at the whole record of the voluntariness hearing that there is no reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error, the trial court's finding of voluntariness should be sustained on appeal." (P. 609.)

In this instance, the evidence bearing upon the circumstances under which defendant's confessions were made is uncontradicted and furnishes no support for a finding that either confession was improperly induced. We conclude that there is no reasonable probability that defendant would have obtained a more favorable result on his motion to suppress evidence had the trial court applied the beyond a reasonable doubt standard.

The judgment of conviction is affirmed.

CERTIFIED FOR PUBLICATION.

Rouse, J.

WE CONCUR:

Taylor, P. J.

Kane, J.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-664

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, vs. BARRY FLOYD BRAESEKE, Respondent.	RECEIVED NOV 24 1980 OFFICE OF THE CLERK SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Barry Floyd Braeseke, by and through his counsel, asks leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The affidavits of respondent and counsel in support of this motion are attached hereto.

CLIFTON R. JEFFERS
Chief Assistant
State Public Defender

Attorney for Respondent

CRJ:lbl

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-664

PEOPLE OF THE STATE OF CALIFORNIA,	)
Petitioner,	)
vs.	)
BARRY FLOYD BRAESEKE,	)
Respondent.	)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BARRY FLOYD BRAESEKE,	)
Respondent.	)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Barry Floyd Braeseke, respectfully requests that this court deny the Petition for Writ of Certiorari, seeking review of the judgment of California Supreme Court entered on August 28, 1980, reported at 28 Cal.3d 86, ___ P.2d ___, ___ Cal.Rptr. ___ (1980), and the opinion filed on November 15, 1979, and reported at 25 Cal. 3d 691, 159 Cal.Rptr. 684, 602 P.2d 384 (1979).

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case with the following additions:

Statement of Facts:

Sergeant Cervi understood that the "off the record" discussion with defendant could not be used against defendant (ST 21).[1/] This "off the record" conversation is separate and distinct from the confession statement (RT 125, 126-A; ST 22). After the conclusion of the "off the record"

1. Respondent adopts the abbreviations used by petitioner to refer to the record.

conversation, according to defendant's testimony, Sergeant Cervi told defendant "it would be better for [him]" if he gave a statement although he would have to go to jail (ST 56). Thereafter defendant gave a recorded, full confession (ST 26, 56; People's Trial Exhibit No. 32).

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT PRESENT THE OPPORTUNITY FOR MEANINGFUL REVIEW OF THE MIRANDA STANDARDS

This case does not present the opportunity for meaningful review by this Court of any legal proposition of general importance. The decision below turns upon a narrow issue growing out of an unusual factual setting, and therefore does not have general applicability to other situations that arise in the Miranda context.

The California Supreme Court's ruling is based on the limited issue of whether the prosecution proved a knowing and intelligent waiver by the defendant of his Miranda rights. After the defendant had asserted his right to counsel, the defendant initiated a conversation with Sergeant Cervi, one of the interrogating officers, on the expressed condition that it be "off the record" and alone with Cervi (ST 19, 20-22, 56; RT 124, 126A). Officer Cervi did not consider the "off the record" discussion to be a waiver of defendant's rights because he felt the statement could not be used against the defendant (ST 21). Petitioner recognizes that defendant did not intend to waive his rights and that Sergeant Cervi understood this (Pet. for Cert. 15). After the conclusion of the "off the record" conversation, Sergeant Cervi told defendant "it would be better for [him]" if he gave a statement (ST 56;

RT 125, 126).[2/] Defendant then confessed.

In finding that these facts do not satisfy the requirement of a knowing and intelligent waiver, the California Supreme Court followed long settled Miranda requirements. The California court ruling is so carefully circumscribed by the limited nature of the issue and the factual setting that this simply represents one of the many cases in which state courts routinely determine whether a suspect has waived his Miranda rights. The case therefore does not provide this court with a vehicle for a meaningful analysis and exposition of the requirements of a knowing and intelligent waiver in the Miranda context.

Moreover, the decision of the California Supreme Court is correct. On the record before it the California high court was not left to speculate about what the defendant and Sergeant Cervi had in mind in talking "off the record." Through the testimony of Sergeant Cervi the Court had before it direct evidence of the subjective state of mind of the parties at the time the discussion took place. This evidence conclusively establishes that both Sergeant Cervi and the defendant intended that their discussion would not be used against the defendant. Under these facts there simply is no basis for concluding that the initiation of the "off the record" conversation constituted a knowing and intelligent waiver. It clearly was just the opposite, an unambiguous expression by defendant of an intent not to waive his rights. Petitioner does not contend otherwise (See Pet. for Cert. 15).

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2. The California Supreme Court in deciding the case on the basis of the waiver question did not reach the issue of whether the confession was improperly induced by the promise of leniency.

Instead, petitioner takes issue with the California Supreme Court's conclusion that there can be no "off the record" discussion (Pet. for Cert. 15, footnote 7). In doing so, petitioner completely skirts the issue of whether the request by defendant to speak "off the record" constituted a waiver of his rights. Yet this is precisely the issue on which the California Supreme Court decision turns. "A request to speak 'off the record' cannot constitute a knowing and intelligent waiver of rights which include the advisement that 'anything [a suspect] says can be used against him in a court of law." (citations). 25 Cal.3d 702, 159 Cal.Rptr. 684, 602 P.2d 384.

> "In view of the lack of any credible evidence that defendant's initiation of the conversation with Sergeant Cervi constituted a knowing and intelligent waiver of his Miranda rights, we must conclude that the continued interrogation of defendant was in violation of Miranda and that the confession resulting therefrom is inadmisssible. [footnote omitted] (citations)." 25 Cal.3d 703, 159 Cal.Rptr. 684, 602 P.2d 384.

Whether one argues as petitioner does, that the "off the record" discussion request indicates that defendant understood his rights or on the other hand agrees with the conclusion of the California Supreme Court that it revealed a lack of understanding of his rights, the result is the same: a clear-cut decision by defendant not to waive his rights.

Petitioner's position seems to be that defendant understood his rights and therefore by initiating the "off the record" conversation he necessarily waived them. This view is flawed and unsustainable for several reasons. First, the confession was not made during the "off the record" discussion. Second, the logical application of petitioner's argument that defendant knew his rights and sought to avoid waiving them by talking "off the record" leads to the inescapable conclusion that defendant did not knowingly and intelligently waive his rights. Third, after the "off the record"

discussion had ended, Sergeant Cervi initiated the confession dialogue by telling defendant "It would be better for [him] if he gave a statement (ST 56). This was followed by Cervi entreating defendant, "can we put that in form of a formal statement, or again words to that effect. I said can I turn the tape recorder on, and can we get a statement from you to that effect" (ST 22).

Petitioner's argument fails to recognize that the "off the record" conversation is separate and distinct from the confession dialogue. By bluring this distinction petitioner erroneously concludes that "when he gave his first confession he no longer wanted to speak 'off the record,' but instead wanted to give a 'formal statement' (Cert. Pet. 16). The record simply does not support such a conclusion. As this Court noted in North Carolina v. Butler, 441 U.S. 369, 373 (1979), "the courts must presume that a defendant did not waive his rights; the prosecution burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." The California high court correctly applied this standard to the facts of this case, in finding "the lack of any credible evidence that defendant's initiation of the conversation with Sergeant Cervi constituted a knowing and intelligent waiver of his Miranda rights." 25 Cal.3d 703, 159 Cal.Rptr. 684, 602 P.2d 384.

It is worthy of note that although petitioner urges this Court to grant plenary review, at no point does he address the narrow waiver question which is the central issue presented by this case. Respondent suggests that this is so because had petitioner attempted to do so he would further demonstrate

that (1) this is not a case that merits review by this Court and (2) the California Supreme Court was correct in its ruling on the waiver issue.

The record of this case and the California Supreme Court's opinion reveal that petitioner's claim that the Miranda requirements have been impermissibly extended does not withstand close scrutiny. As we have shown, under the facts of this case, the California Supreme Court did not have to decide the waiver question on the basis of inferences alone. It could and did rely on the subjective state of mind of the parties involved. Thus petitioner's reliance upon North Carolina v. Butler, supra, 441 U.S. 369 (1979) is misplaced.

The circumstances under which the confession dialogue began are such that petitioner does not argue that defendant waived his rights at that juncture. For as the California Supreme Court implicitly recognized the "off the record" conversation was the vehicle by which Sergeant Cervi was able to generate the confession. Consequently, since the "off the record" discussion did not constitute a waiver there surely could not have been a knowing and intelligent waiver by defendant interposed between the "off the record" talk and Cervi's commencement of the confession.

Since there has been no extension of Miranda safeguards in this case, this is not an appropriate case for review by this Court.

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CONCLUSION

For the foregoing reasons respondent respectfully submits that the petition for a writ of certiorari to review the judgment of the Supreme Court of California should be denied.

DATED: November 21, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

CLIFTON R. JEFFERS
Chief Assistant
State Public Defender

CRJ:lbl

Attorneys for Respondent

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

No. 80-664

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BARRY FLOYD BRAESEKE,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

CLIFTON R. JEFFERS, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 1390 Market Street, Suite 425 in the City and County of San Francisco, State of California; that on November 21, 1980, he served a true copy of the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopess addressed respectively as follows:

George M. Deukmejian
Attorney General of the State of California
6000 State Building
San Francisco, California 94102

D. Lowell Jensen
District Attorney, Alameda County
1225 Fallon Street
Oakland, California 94612

Rene C. Davidson
County Clerk, Alameda County
1225 Fallon Street
Oakland, California 94612

Clerk, California Supreme Court
State Building
455 Golden Gate Avenue
San Francisco, California 94102

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

CLIFTON R. JEFFERS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-664

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BARRY FLOYD BRAESEKE,

Respondent.

AFFIDAVIT

I, CLIFTON R. JEFFERS, being first duly sworn according to law, depose and say, in support of respondent's motion for leave to proceed without being required to prepay costs or fees:

1. I am an attorney in the office of the California State Public Defender, licensed to practice law in the state of California and a member of the Bar of the Supreme Court of the United States.

2. I represented respondent in opposition to a previously filed Petition for Writ of Certiorari before the Supreme Court of the United States in the October Term, 1979, in case No. 79-1465.

3. In case No. 79-1465 respondent filed the attached affidavit in support of his Motion for Leave to Proceed in Forma Pauperis, and the motion was granted.

4. Due to difficulties in communication associated with mail delivery I have not received a more current affidavit from respondent.

5. There has been no change in respondent's status since the execution of the attached affidavit on April 8, 1980, in that he remains incarcerated in the California State Prison.

6. I believer Mr. Braeseke to be indigent and entitled to proceed in forma pauperis pursuant to Rule 45.

DATED: November 21, 1980

CLIFTON R. JEFFERS
Chief Assistant
State Public Defender

Duly witnessed and sworn
to before me, a notary public,
this 21st day of November, 1980.

Carol A Schmidt

CAROL A. SCHMIDT
NOTARY PUBLIC-CALIFORNIA
CITY AND COUNTY OF
SAN FRANCISCO
My Commission Expires Dec. 20, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1465

THE PEOPLE OF THE STATE OF CALIFORNIA, PETITIONER

vs.

BARRY FLOYD BRAESEKE, RESPONDENT

AFFIDAVIT

I, BARRY FLOYD BRAESEKE, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was sentenced to a California State prison by the Alameda County, California Superior Court on three (3) counts of first degree murder. My convictions were reversed by the Supreme Court of California. The present proceeding was commenced by the People of the State of California in a Petition for a Writ of Certiorari to the Supreme Court of California.

Barry Floyd Braeseke

Duly witnessed and sworn to before me, a Notary Public, this 8 day of April, 1980.

Notary Public